LIM SEW LAN

v.

PEMBANGUNAN HYSHAM SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-820-1998]
5 APRIL 1999

CONTRACT: *Breach - Variation of contract - Whether fundamental breach - Contracts Act 1950, s. 40*

CONTRACT: *Formation - Inducement - Representations in sales brochure - Whether part of contract - Intention of parties*

CIVIL PROCEDURE: *Action - Mode of action - Construction of contractual terms - Whether to proceed by originating summons - Whether by writ*

The plaintiff sought declarations and orders from the court in relation to an agreement for the purchase by the plaintiff of a three-storey building ('the agreement') in the defendants' development project at Setapak. The development, as highlighted by recital C of the agreement, consisted of six blocks of five-to-seven-storey shop office and service suites ('the development').

The plaintiff sought to terminate the agreement when the defendants scaled down the development to exclude the service suites, and reduced the total floor space of the development by about one-half. In response, the defendants argued that cls. 7.2 and 9.1 of the agreement allowed the defendants to alter the building plans, and that the action should have been commenced by writ and not originating summons.

Held:

[1] The plaintiff had been induced to enter into the agreement by the defendants' representations contained in its sales brochure. Where a statement is represented in such a way as to represent a fact which induces the representee to enter into a contract, then such statement intends to have contractual force and is thus a contractual term.

[2] In construing the terms and conditions of a contract, the court has to consider the object of the agreement in tandem with the manifest intention of the parties. By recital C of the agreement, the defendants had covenanted to build six blocks of five-to-seven-storey shop office and service suites, and as such, a breach of such covenant went to the root of the contract.

[3] Furthermore, the word 'building' in the agreement had been clearly defined to include the service suites. The parties had therefore clearly intended the representation to be a condition or term of the agreement, a breach of which would entitle the plaintiff to terminate the agreement.

[4] By refusing to stand by the brochure, recital and terms of the agreement, the defendants had breached s. 40 of the Contracts Act 1950. In the absence of any acquiescence in the breach or its continuance, the plaintiff was entitled to rescind the agreement.

[5] Clauses 7.2 and 9.1 only applied to alterations unilaterally imposed by the appropriate authority and not to instances where the changes were proposed by the defendants. Whilst the defendants could apply for approval of some changes, such changes ought to be reasonable and ought not to go to the very substance of the contract by altering the concept, ambit and scope of the development.

[6] The defendants' argument that the action should have been commenced by writ was unacceptable as the entire case rested on the interpretation of cls. 7.2 and 9.1, and affidavit evidence was more than sufficient.

[Order in terms]

Case(s) referred to:
Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd [1998] 2 CLJ 301 ***(foll)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40

Other source(s) referred to:
Chitty on Contracts, 27th edn, vol 1, para 13-018, p 630

For the plaintiff - HL Goh; M/s SK Yeoh & Jeganathan
For the defendants - K Kirubakaran (Mr Jeyasingam with him); M/s Kiru & Yong

Reported by Anne Khoo

JUDGMENT

RK Nathan J:

Facts

The 1st defendant is the owner of a piece of land (the land) and the 2nd defendant is presently developing the said land as a mixed residential cum commercial development known as the "Setapak Commercial Centre" (the centre). The centre consists of 6 blocks of five to seven storey shop office and service suites. The plaintiff entered into a sale and purchase agreement dated 19 November 1997 (the agreement) with both the defendants for the purchase of one unit of shop office which consists of ground, first and second floors (the three storey unit) within the six blocks of five to seven storey shop office and service suites. The Recital C to the said agreement confirmed that "the vendor is developing and constructing six blocks of five (5) to seven (7) storey shop office and service suites in accordance with approved layout plans and specifications on part of the land".

Pursuant to the terms of the said agreement the plaintiff paid a sum of RM114,660 as 15% deposit upon execution of the said agreement.

The plaintiff then heard news that the defendants no longer intended to construct the six blocks of five to seven storey shop office and service suites, but only intended to construct three storey shop offices without service suites. The plaintiff then instructed his solicitors to write to the defendants if this was true. The plaintiff's solicitors' three letters dated 12 March 1998, 18 March 1998 and 26 March 1998 to this effect, elicited no response. The plaintiff or his representative then spoke to a representative of the 2nd defendant who confirmed that the 2nd defendant would only construct three storey shop offices without service suites. This was recorded in writing by the plaintiff's solicitors' letter dated 13 April 1998. The plaintiff then terminated the agreement through his solicitors' letter dated 16 April 1998 and demanded the full refund of the deposit. Upon the defendants' refusal to comply, the plaintiff commenced this action. In the meantime, the defendants' application to the relevant authorities to scale down the development of the Centre to three storey shop offices had been approved on 6 October 1998.

This Application

By this originating summons the plaintiff is seeking:

1. A declaration that the defendants would be "developing and constructing six (6) blocks of five (5) to seven (7) storey shop office and service suites ... on part of the Land" ("Representation") to be deemed a term, condition and/or covenant of a sale and purchase agreement ("Agreement"), dated the 19.11.97 between the Plaintiff and the Defendants.

2. Alternatively, a declaration that the Representation be implied as a term, condition and/or covenant of the Agreement.

3. A declaration that the Defendants' failure, refusal and/or neglect to confirm the defendants' compliance with and performance of the Representation be deemed an act of repudiation on the part of the Defendants, whereby the Agreement has been properly terminated by the Plaintiff effective from the 16th April 1998.

4. An order that the Defendants jointly and severally refund to the Plaintiff the sum of RM114,660-00 being the deposit ("Deposit") paid by the Plaintiff pursuant to the Agreement.

5. An order that the Defendants jointly and severally pay the Plaintiff interest on the Deposit at the rate of 8% per annum calculated from the 28th April 1998 until the date of full repayment.

6. Alternatively, an order for damages and interest on the damages to be awarded at the rate of 8% per annum from the date of this summons until date of full repayment.

7. An order that the Defendants jointly and severally pay the costs of this action.

8. Such further and other relief as this Honourable Court deems fit and proper.

Findings Of The Court

The Brochure

The plaintiff annexed a copy of the 2nd defendant's brochure which included the location plan of the said Centre together with details of the sub-divided lots in the six blocks. The words "6 Blocks Of 5-7 Storey Shop/Office" were clearly typed in bold print at the bottom of the plan. The plaintiff contends that he was induced by this brochure to enter into this agreement. In *Low Kon Fatt v. Port Klang Golf Resort (M) Sdn Bhd* [1998] 6 MLJ 448; [1998] 3 CLJ Supp 301 the plaintiff had paid RM32,000 and had acquired membership of a golf resort. It was the plaintiff's case that he was lured into membership with the resort by virtue of a brochure that promised proposed facilities, in particular seasports facilities, which were not fulfilled. I had, in upholding the plaintiff's claim to rescission and ordering a refund of the sum of RM32,000 found that the plaintiff was motivated by the offer of the seasports as stated in the brochure, to have entered into the contract. I also held that a representation must be distinguished from a mere statement, but where a statement is represented in such a way as to represent a fact which induces the representee to enter into a contract then such a statement intends to have

contractual force and is thus a contractual term. It is time that contracting parties realise that representations contained in brochures ought not to be used as a gimmick to entice innocent parties into a bargain which the contacting party has no intention of honouring. In this case the plaintiff has emphatically maintained that he was induced by this representation to purchase the said unit. I have no hesitation therefore in concluding that the representation made in the brochure did indeed induce the plaintiff to enter into the agreement.

Recital To The Agreement

I am of the view that my task has been made easier by the fact that the representation as contained in the brochure has in fact been incorporated as Recital C to the said agreement. In construing the terms and conditions of an agreement, the court has to consider the object of the agreement in tandem with the manifest intention of the parties. *Chitty on Contracts* 27th edn vol 1 states at para 13-018 (p. 630) as follows:

> Where words of recital or reference manifest a clear intention that the parties should do certain acts, the courts will from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect.

If the defendants had therefore covenanted that they would build six blocks of five - seven storey shop office and service suites then it is my judgment that a breach of such a covenant by the defendants goes to the root of the contract as a clear deviation of the manifest intention and object of the contracting parties.

Terms Of The Agreement

The case for the plaintiff has been made even easier by the fact that what is contained in the brochure and recital has become a term in the agreement. "Building" has been defined in the agreement as:

> the six (6) blocks of five (5) to seven (7) storey shop office and service suites to be constructed by the Vendor on part of the Land;

The word "building" is used throughout the agreement to imply what it defines. Again this term in my view goes to the root of the agreement. It is my judgment that the parties had clearly intended the said representation to be a condition or term of the agreement whereby a breach thereof, would entitle the plaintiff to terminate the said agreement. The plaintiff had obviously relied upon and was induced into executing the said agreement by the said representation.

Section 40 of the Contracts Act 1950 reads as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

In this case no doubt, by refusing to stand by the brochure, recital and terms of the agreement, which clearly stated that the defendants intended to build six blocks of five - seven storey shop office and service suites and substituting the same with three storey shop office with no service suites, the defendants have been in breach of s. 40 of the Contracts Act 1950 and the plaintiff is entitled to rescind the agreement since I find that the plaintiff has not either by words or conduct acquiesced in its continuance.

Whilst vehemently denying the plaintiff's contention, the defendants rely on cls. 7.2 and 9.1 of the said agreement which read as follows:

> 7.2 The Building Plans of the Project, including the Property, has been approved by the Appropriate Authority and no alteration to the Building Plans shall be made or carried out except as may be required or approved by the Appropriate Authority. Such alteration shall not annul the Agreement or be the subject of any claim for damages or compensation by or against any party to the Agreement.
>
> 9.1 The Property shall be constructed in a good and workmanlike manner in accordance with the description set out in the Third Schedule hereto and in accordance with the Building Plans and any other plans approved by the Appropriate Authorities which description and plans have been accepted by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made except such as may be required by the Appropriate Authorities and such changes, variations or amendments shall not give rise to or be the basis of any claim by the Purchaser against the Vendor or for the avoidance of this Agreement.

These are the relevant clauses with regard to the right of the defendants to alter the building plans. It is the defendants' contention that both these clauses seek to protect and exclude the liability of the defendants in the event there are alterations to the building plans.

Clauses 7.2 And 9.1

To my mind the submission of the defendants that they are protected by these clauses is totally unacceptable. The exemption clause to the said clauses takes effect only when the alterations or changes or deviations of the building plans are required or approved by the appropriate authority. It is obvious that these clauses would only apply where the alterations or changes or deviations are unilaterally imposed by the appropriate authority.

However, in cl. 7.2 the exemption clause also applies to alterations approved by the appropriate authority. This I see as clearly envisaging instances where the defendants themselves apply to alter the building plans. I reject the plaintiff's submission that the word "approved" does not relate to instances when the defendants themselves seek the approval of the relevant authorities in respect of alterations to the building plans. If such an interpretation as is propounded by the plaintiff is to be accepted, then it gives the defendants no room at all to apply for approval for any alterations whatsoever. Such an interpretation would lead to ridiculous situations in that any alteration whether minor or major could result in the plaintiff seeking rescission of the contract. What is just is to strike a happy medium. Whilst the law would scoff at the interpretation sought to be put by the plaintiff the law would equally reject the submission of the defendants that whatever the alteration may be, even when such alteration goes to the very root of the original contract, so long as the alteration is approved by the appropriate authority, the plaintiff has no recourse to rescind the agreement. Both views are extremes and have no place in a just law. If indeed the defendants are entitled to a blanket protection whenever they apply to alter the building plans, there is nothing to stop the defendants from applying to alter the building plans from shop offices to a shopping mall instead, and thereafter forcing the purchasers who had bought shop offices under the agreement to buy retail lots in the shopping mall. The law will not countenance such a view.

The defendants themselves had applied to the relevant authority, namely the Dewan Bandaraya Kuala Lumpur (DBKL), to scale down to no higher than three storey shop offices. In actual fact the letter from DBKL dated 6 October 1998 which is exhibited in support of the defendants' affidavit clearly states that the total floor space has been reduced to 396,996 square feet. The area prior to the alteration showed the total area as 806,923 square feet. This drastic reduction no doubt would have a bearing. These are shop offices intended for business. Needless to say the plaintiff's as well as each of the purchaser's business would depend upon a high population density that would be generated if the 2nd defendant had stuck to the original plan of six blocks of five to seven storey shop office with service suites. This must no doubt have a telling effect as to why the plaintiff now seeks a rescission of the contract. The defendants no doubt can apply to the DBKL for alteration but such alterations sought ought to be reasonable and ought not in any case to go to the very substance or root of the contract by being construed as a breach of a fundamental term by altering the concept, ambit and scope of the development.

Finally the argument of the defendants that this action ought not to have proceeded by way of an originating summons but by a writ action is unacceptable. The entire case rests, as averred by the defendants themselves, on the interpretation to be put to cls. 7.2 and 9.1. Affidavit evidence is more

than sufficient. A trial by way of witnesses' evidence would have been a waste of judicial time and litigants' money. In fact in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] 2 MLJ 211 the Federal Court in considering the same issue held the view that, if the party seeking a writ action wanted oral testimony of witnesses, that party could have sought leave to cross-examine the deponents to the affidavits in the original summons action. Having considered all issues I find it appropriate to grant the plaintiff an order in terms of prayers (1), (3), (4), (5) and (7).